DUOC

No. 06- 11204

IN THE

Supreme Court of the United States

DEONDERY CHAMBERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant's failure to report for confinement "involves conduct that presents a serious potential risk of physical injury to another" such that a conviction for escape based on that failure to report is a "violent felony" within the meaning of the Armed Career Criminal Act, 18 U.S.C. § 924(e).

PARTIES TO THE PROCEEDING

The only parties to the proceeding are those appearing in the caption to this petition.

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Petitioner Deondery Chambers respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was entered on January 9, 2007. It has been officially reported and can be found at *United States* v. *Chambers*, 473 F.3d 724 (7th Cir. 2007). It is reproduced in the Appendix at 1a-7a. The district court held a sentencing hearing on May 12, 2006 at which the judge orally ruled that the defendant's prior conviction for escape under Illinois law was a "violent felony" within the meaning of the Armed Career Criminal Act, 18 U.S.C. § 924(e). The relevant portion of the transcript is reproduced in the Appendix at 18a-27a.

JURISDICTION

The court of appeals issued its opinion on January 9, 2007. Petitioner timely sought rehearing, which was denied on February 16, 2007. Pet. App. 14a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

18 U.S.C. 924(e) provides, in pertinent part, as follows:

> (e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).
>
> (2) As used in this subsection—
>
> * * * *
>
> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

STATEMENT OF THE CASE

This case presents a mature split of authority regarding a recurring issue that members of this Court have recently acknowledged requires this Court's attention. The Armed Career Criminal Act ("ACCA") provides an enhanced 15 year mandatory minimum sentence, and up to life imprisonment, for anyone guilty of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), who had previously been convicted of three serious drug and/or violent felonies. 18 U.S.C. § 924(e). Without the ACCA enhancement, the statutory maximum sentence for a violation of § 922(g)(1) is ten years.

The Courts of Appeals have diverged over whether a prior conviction for escape based on a failure to report to confinement is a "violent felony" within the meaning of the ACCA. Unlike a prison break from secure custody, a failure-to-report escape does not involve breaking free from the physical custody of an officer of the state or a secure detention facility. Failure-to-report escapes occur when a detainee is, for any of a number of reasons, provided the opportunity to move about the community without supervision for a limited period of time, but fails to return or report to his or her facility within the appointed time. It is a crime of omission.

There is a 10 to 2 split of authority on whether all escapes should be treated as violent crimes for purposes of career offender status. The Ninth Circuit has held that a failure-to-report escape is not a violent crime. *United States* v. *Piccolo*, 441 F.3d 1084, 1088-90 (9th Cir. 2006). The D.C. Circuit has also indicated that it would not treat a failure-to-report escape as a violent crime, and recognized that failure-to-report escapes are different from both prison breaks from secures facilities and escapes from the physical custody of an officer. *United States* v. *Thomas*, 333 F.3d 280, 282-83 (D.C. Cir.

2003).[1] In the decision below, Judge Posner acknowledged "[a]s an original matter, one might have doubted whether failing to report to prison, as distinct from escaping from a jail, prison, or other form of custody, was a crime that typically or often 'involves conduct that presents a serious potential risk of physical injury to another.'" Pet. App. 2a (quoting *United States* v. *Golden*, 466 F.3d 612, 616-17 (7th Cir. 2006) (Williams, J., dissenting)). But the Seventh Circuit panel below was bound by prior Seventh Circuit decisions which had held that all escapes are violent crimes. *Id.* Nine other circuits have so held. *United States* v. *Winn*, 364 F.3d 7, 12 (1st Cir. 2004); *United States* v. *Rivera*, 127 F. App'x 543, 545 (2d Cir. 2005) (citing *United States* v. *Jackson*, 301 F.3d 59 (2d Cir. 2002)); *United States* v. *Luster*, 305 F.3d 199, 202 (3d Cir. 2002); *United States* v. *Mathias*, No. 06-4109, 2007 WL 1097952, at *3-5 (4th Cir. Apr. 13, 2007); *United States* v. *Ruiz*, 180 F.3d 675, 676-77 (5th Cir. 1999); *United States* v. *Anglin*, 169 F. App'x 971, 975 (6th Cir. 2006) (citing *United States* v. *Harris*, 165 F.3d 1062 (6th Cir. 1999)), *cert. denied*, 127 S. Ct. 1249 (2007); *United States* v. *Nation*, 243 F.3d 467, 472 (8th Cir. 2001); *United States* v. *Turner*, 285 F.3d 909, 915-16 (10th Cir. 2002); *United States* v. *Gay*, 251 F.3d 950, 952-55 (11th Cir. 2001) (per curiam).

This well developed split of authority warrants this Court's review, especially in light of this Court's recent decision in *James* v. *United States*, 127 S. Ct. 1586 (2007). The relevant provision of the ACCA defines "violent felony" by reference to a list of specific, enumerated offenses (burglary, arson, extortion or crimes involving the use of explosives). 18 U.S.C. § 924(e)(2)(B)(ii). The ACCA also includes a residual provision, covering any unenumerated felony that "otherwise involves conduct that presents a serious potential risk of

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[1] *Thomas* involved an escape from the physical custody of an officer, not a failure to report. 333 F.3d at 282-83. As a result, the D.C. Circuit did not have an occasion in *Thomas* to apply its view that failure-to-report escapes "may not inherently create a risk of harm to others." *Id.* at 283.

physical injury to another." *Id.* Because *James* involved a crime analogous to an enumerated offense (attempted burglary), the majority opinion declined to provide a standard for determining whether an offense that is not analogous to an enumerated offense is a "violent felony" within the meaning of the ACCA. *James*, 127 S. Ct. at 1598. The dissenting opinion argued that leaving such a substantial gap in the interpretation of a frequently invoked federal criminal statute ill serves courts and counsel. *Id.* at 1601-02 (Scalia, J., dissenting). The majority did not disagree that this Court's guidance is needed. It merely noted that a case involving a crime analogous to an enumerated offense was not an appropriate vehicle for an opinion that provides a standard for determining when a crime that is not analogous to an enumerated offense is a "violent felony."

This case is an excellent vehicle to address this substantial gap in the interpretation and application of the ACCA. Failure-to-report escapes occur frequently, and as the body of appellate decisions ruling on whether such escapes are violent crimes indicates, they are often relied upon to support an enhanced sentence for armed career offenders. Failure-to-report escapes are not analogous to any of the crimes specifically enumerated as violent felonies in the ACCA. There is no ambiguity in the record that petitioner's prior conviction for "escape" under Illinois law was for a failure to report to confinement, not a physical break from a secure facility or the custody of a state official.

In short, this case provides a strong vehicle for this Court to address a question of statutory interpretation that its own recent decision indicates is urgently needed. There is a well developed split of authority on the question that, as Judge Posner's opinion indicates, will persist by force of circuit precedent in the absence of action by this Court. The petition should be granted.

1. Petitioner pled guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). Pet. App. 1a. The

indictment also charged that petitioner had violated 18 U.S.C. § 924(e), the ACCA provision that provides for a mandatory minimum sentence of 15 years in prison for those violating § 922(g) who have previously committed three serious drug and/or violent felonies. *Id.* at 15a. The prosecution subsequently filed an information identifying the three predicate convictions it claimed were qualifying felonies under the ACCA that supported sentencing under 18 U.S.C. § 922(e). One of the convictions was for escape under Illinois law on June 30, 1999. *Id.* at 16a.

Illinois law defines an escape to include both breaking free from physical confinement (one who "escapes from any penal institution or from the custody of an employee of that institution") and also failure-to-report escapes (one who "knowingly fails to report to a penal institution or to report for periodic imprisonment at any time or knowingly fails to return from furlough or from work and day release or who knowingly fails to abide by the terms of home confinement"). 720 ILCS 5/31-6(a). There is no dispute that Chambers's "escape" was a failure-to-report, the Illinois charging document made clear that petitioner had been charged with knowingly failing to report for incarceration on various dates. Pet. App. 22a.

The trial court held a sentencing hearing at which petitioner challenged the categorization of his failure-to-report escape conviction as a "violent felony" within the meaning of the ACCA. The district court, citing Seventh Circuit precedent, stated that "for reasons of simplicity ... escape is escape. And we're not going to get into the nuances of it for purposes of the sentencing statute." Pet. App. 27a. Following Seventh Circuit authority, the district court refused to treat a failure-to-report escape as different from a custodial escape, and thus concluded that petitioner was an armed "career offender under the statute." *Id.*

The conclusion that petitioner was an armed career offender under § 924(e) substantially enhanced his sentence, raising

his statutory minimum from 0 to 15 years, and his maximum from 10 years to life. Treating him as an armed career criminal, the district court also applied Section 4A1.4 of the Sentencing Guidelines, which incorporates the ACCA, resulting in a Guidelines range of 188 to 235 months. The district court sentenced petitioner to the low end of that range, 188 months, which is slightly above the statutory mandatory minimum of 15 years under the ACCA. Had he not been treated as an armed career criminal, petitioner's guidelines range would have been 130 to 162 months. Pet. App. 1a-2a. But he would not have been sentenced to more than 120 months because that would have been the statutory maximum for his offense.

2. Petitioner appealed his sentence, and the Seventh Circuit affirmed. Judge Posner's opinion for the court begins by noting that it "might [be] doubted" that a failure-to-report escape is typically or often a crime that poses a serious risk of physical harm to others. Pet. App. 2a. The opinion also explicitly acknowledges a split of authority regarding the treatment of failure-to-report escapes as a violent crime under the ACCA. *Id.* at 2a-3a. And the opinion further recognizes the propriety and ease of distinguishing a failure-to-report escape from "jail or prison breaks" for the purpose of determining whether the escape at issue is a violent crime under the ACCA. *Id.* at 3a.

Nonetheless, the panel chose to adhere to its own court's precedent and held that petitioner's failure-to-report escape was properly considered a violent felony under the ACCA. Pet. App. 3a-4a. Nonetheless, the opinion notes that the rule treating failure-to-report escapes like prison breaks "is an embarrassment to the law" because it is based on "a conjecture as to the possible danger of physical injury posed by criminals who fail to show up to begin serving their sentences or fail to return from furloughs or to halfway houses." *Id.* at 4a. The decision further criticizes the reasoning of the "head of the line of cases that lump all escapes together, *United States* v. *Gosling*, 39 F.3d 1140,

1142 (10th Cir. 1994)"—that every escape carries the potential for violence because of the "supercharged emotions" that may cause an escapee to "feel threatened by police officers, ordinary citizens, or even fellow escapees." Pet. App. 4a. According to the court, this rationale amounted to "ruminations [that] should not be treated as authoritative" for failure-to-report escapes. *Id.* at 5a. The Seventh Circuit casts further doubt on the majority view by noting that "if the courts insist on lumping all escapes together in determining whether escape is a crime of violence, the enormous preponderance of [failure-to-reports (according to a recent study, nearly 90%)] could well compel a conclusion that escape is never a crime of violence." *Id.* at 6a.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's opinion acknowledges two critical facts about the treatment of failure-to-report escapes: (1) there is a well developed split of authority regarding whether a failure-to-report escape should be deemed a "violent felony," and (2) the rationale for treating a failure-to-report escape as a "violent felony" is weak. These facts alone would warrant this Court's review. But review in this case has been made even more compelling by this Court's decision in *James*, which exposed the urgent need for this Court to address the proper standard for determining whether a crime, such as a failure-to-report escape, that is not analogous to those violent crimes specifically enumerated in the ACCA should be treated as a "violent felony" for purposes of the ACCA.

1. Ten courts, including the Seventh Circuit below, have stated that all escapes should be treated as a violent crime. Pet. App. 3a-4a (decision below); *Winn*, 364 F.3d at 12 (failure to return to halfway house); *Rivera*, 127 F. App'x at 545 (failure-to-report escape is a violent crime under ACCA) (citing *United States* v. *Jackson*, 301 F.3d 59 (2d Cir. 2002) (prisoner walking off from work program)); *Luster*, 305 F.3d at 202 (treating a conviction as a crime of violence even when

"the statute clearly extends to a 'walk away' from custody not involving any contemporary violence"); *Mathias*, 2007 WL 1097952, at *3-5 (walkaway from a work release program); *Ruiz*, 180 F.3d at 676-77 (walkaway from prison camp without barriers and armed guards); *Anglin*, 169 F. App'x at 975 (reasoning that any conviction under the federal escape statute, 18 U.S.C. § 751, is a crime of violence even though the statute extends to conduct as simple as reporting late to serve a sentence) (citing *United States* v. *Harris*, 165 F.3d 1062 (6th Cir. 1999)); *Nation*, 243 F.3d at 472 (stating that "every escape, even a so-called 'walkaway' escape" is a crime of violence); *Turner*, 285 F.3d at 915-16 (failure to return to halfway house); *Gay*, 251 F.3d at 952-55 (walkaway from non-secure diversion center).[2] As the decision below notes, the rationale for this view that has been repeatedly cited and followed by various circuits was articulated by the Tenth Circuit in *United States* v. *Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994). *Gosling* was actually not a failure-to-report case, but involved "'willfully, unlawfully, and feloniously escap[ing] from ... [a] County Jail.'" *Id.* at 1142 (alterations and omission in original). Nonetheless, the *Gosling* court reasoned broadly:

> every escape scenario is a powder keg, which may or may not explode into violence and result in physical injury to someone at any given time, but which always has the serious *potential* to do so. A defendant who escapes from a jail is likely to possess a variety of

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[2] Several of the cases involve appeals challenging the treatment of an escape as a "crime of violence" under the Sentencing Guidelines, U.S.S.G. § 4B1.2. The definition of "crime of violence" provided in that guideline provision is nearly identical to the definition of "violent felony" in the ACCA. *Compare* U.S.S.G. § 4B1.2, *with* 18 U.S.C. § 924(e)(2)(B). For that reason, lower courts have treated cases interpreting this guideline provision as no different from cases interpreting the ACCA, and vice-versa. *See Winn*, 364 F.3d at 9 n.1 (noting uniform view of courts that interpretation and application of Guidelines provision can be applied to ACCA).

> supercharged emotions, and in evading those trying to recapture him, may feel threatened by police officers, ordinary citizens, or even fellow escapees. Consequently, violence could erupt at any time. Indeed, even in a case where a defendant escapes from a jail by stealth and injures no one in the process, there is still a serious potential risk that injury will result when officers find the defendant and attempt to place him in custody.

Id. (internal citation omitted). The Tenth Circuit's reasoning was a material (and unnecessary) extension of the case upon which it relied, *United States* v. *Aragon*, 983 F.2d 1306 (4th Cir. 1993). In *Aragon*, the Fourth Circuit had held that escape from a federal prison was a crime of violence because of the circumstances of the prison custodial setting. *Id.* at 1313. That limited rationale would have been sufficient to support treating Gosling's escape from jail as a crime of violence. But the Tenth Circuit went further, looking beyond the circumstances of the case to the potential circumstances of the escapee's later apprehension.

Gosling's speculation regarding the potential for violence during recapture has proved the essential justification for treating failure-to-report escapes as violent crimes just like jail or prison breaks. *Winn*, 364 F.3d at 12 (treating failure to return to halfway house as violent crime because "there is still a serious potential risk that injury will result when officers find the defendant and attempt to place him in custody"); *Luster*, 305 F.3d at 202 (emphasizing that "the escapee must continue to evade police and avoid capture"); *Mathias*, 2007 WL 1097952, at *4 ("Even if the escape itself could somehow sidestep any potential risk of injury, the circumstances of recapture necessarily encompass just such a risk."); *Turner*, 285 F.3d at 916 ("there is no way to predict what an escapee will do when encountered by the authorities"). Indeed, the Seventh Circuit decision which bound the panel below specifically relied on the argument that "the potential for a violent confrontation arises between the defendant and law

enforcement during the attempted capture," even when the escape crime was a mere failure to report to a correctional facility or a halfway house. *United States* v. *Golden*, 466 F.3d 612, 614 (7th Cir. 2006), *petition for cert. filed*, No. 06-10751 (U.S. Apr. 9, 2007).

Two courts have openly rejected the rationale behind the majority view. The Ninth Circuit has specifically held that a failure-to-return escape is not a crime of violence. *Piccolo*, 441 F.3d at 1088-90. The Ninth Circuit noted that failure-to-report or walkaway escapes, do not involve the same risk of confrontation as an escape from secure confinement or physical custody. *Id.* at 1088. *Piccolo* squarely rejected *Gosling*, and its progeny, precisely because the danger to others posed by an escape from "a secured facility or the custody of an armed guard" is not present when the escapee leaves a halfway house with permission and fails to return. *Id.* at 1089.

The D.C. Circuit has specifically discussed the recapture rationale, and rejected it. *Thomas*, 333 F.3d at 282-83. After noting that numerous courts have followed the reasoning of *Gosling*, *Thomas* observed:

> While it may be true that the recapture of an escapee inherently contains a risk of violent encounter between the escapee and the arresting officers, the same is true as to the capture of any lawbreaker. Thus, one might argue that under the approach of those circuits, all crimes become crimes of violence ....

Id. at 282. Though the *Thomas* court rejected the rationale of *Gosling*, it nonetheless concluded that the escape before it was a crime of violence because Thomas's crime was "escape from an officer," which creates a more apparent risk of violence. *Id.* at 283. Anticipating the analysis in *Piccolo*, the D.C. Circuit observed: "A prisoner not returning to a halfway house or sneaking away from an unguarded position in the night may not inherently create a risk of harm to others. A

prisoner escaping from the custody of an officer does create such an inherent risk." *Id.*

In the decision below, Judge Posner was bound by circuit precedent, but made clear his belief that there is substantial merit to the analyses of the Ninth and D.C. Circuits. He specifically recognized that this Court's decisions make it perfectly appropriate to distinguishing between an escape from physical custody on the one hand and a failure-to-report or walkaway escape on the other. "The sentencing judge would not have to dig beneath the charging document or the other, limited evidence on which a judge is permitted by *United States* v. *Shepard*, 544 U.S. 13 (2005), to decide which bin a conviction for escape belonged in." Pet. App. 3a.[3] He also pointed to the absurdity of the majority rule: showing up an hour late to prison could result in a 15-year mandatory sentence under the ACCA. *Id.* at 2a.

Judge Posner's reservations about the result in this case were not sufficient, however, to overcome the force of circuit precedent. The same will remain true in the numerous other circuits where the decision has already been made, based on highly questionable reasoning, to treat all escapes as violent crimes. And the issue is likely to continue to arise with some frequency. As the substantial body of decisions in the lower courts demonstrates, a prior conviction for escape is commonly relied upon as a predicate violent crime to support an armed career offender sentence. Numerous statutes, including the Illinois statute at issue here, 720 ILCS 5/31-6(a), and the federal escape statute, have been interpreted or expressly define escape to include not only escape from the physical custody of a state official or secure facility, but also

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[3] This Court held in *Sheperd* that a subsequent court trying to determine whether a prior conviction should be treated as a violent felony under the ACCA may consider "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." 544 U.S. at 16; *see also Taylor* v. *United States*, 495 U.S. 575, 600-02 (1990).

failures to report and walkaways from non-secure facilities. See, *e.g.*, *Anglin*, 169 F. App'x at 974-75 (discussing the breadth of the federal escape statute, 18 U.S.C. § 751); 18 Pa. Cons. Stat. Ann. § 5121(a) (defining escape to include "fail[ure] to return to official detention following temporary leave granted for a specific purpose or limited period"); N.J. Stat. Ann. 2C:29-5(a) (same); Ariz. Stat § 13-2501 (same); Cal. Penal Code § 4530 (subsection (c) defines escape to include the "willful failure ... to return" of those on temporary release); Ga. Code Ann. § 16-10-52 (subsection (a)(5) includes failure to return). Only this Court's intervention can resolve the split of authority and provide uniform treatment of this frequently invoked provision that produces such harsh sentences.

2. The need for this Court's review of this issue has been made even more urgent by this Court's recent decision in *James* v. *United States*, 127 S. Ct. 1586 (2007). In *James*, this Court held that attempted burglary, as defined by Florida law, is a violent felony for purposes of the ACCA's residual clause. *Id.* at 1590-91. The reasoning of the decision was, however, limited. This Court did not offer a generally applicable method for determining whether unenumerated crimes qualify as violent felonies under the ACCA's residual clause. The majority opinion did not purport to decide whether attempted burglary, if it were defined differently than it has been defined in Florida, would qualify as a violent felony under the residual clause. *Id.* at 1595-96. Instead, it simply determined that attempted burglary as defined by Florida law "poses the same kind of risk" as completed burglary (which is an enumerated violent felony under the ACCA), and hence is properly considered a violent felony under the residual clause. *Id.* at 1595.

The *James* majority concedes that it did not provide any guidance for lower courts with respect to whether a crime that is not analogous to one of the enumerated crimes in the ACCA is a violent felony. The majority acknowledged that

"provid[ing] guidance for the lower courts in future cases [is] surely a worthy objective." *Id.* at 1598. But *James* itself was not a proper case to do so because the case did not present such a crime, and certain issues relevant to the inquiry had not been briefed. *Id.*

Justice Scalia's dissenting opinion elaborated on why it is so important to provide a generally applicable, uniform standard that lower courts can use to decide whether an offense is a "violent felony" within the meaning of the ACCA: without such guidance, the court system is left without any way to provide "an acceptable degree of consistency by the hundreds of district judges that impose sentences every day." *Id.* at 1601 (Scalia, J., dissenting). The *James* dissent noted that there are numerous crimes that are not analogous to any of the enumerated offenses (burglary, arson, extortion, and crimes involving the use of explosives, 18 U.S.C. § 924(e)(2)(B)(ii)). Justice Scalia himself provided various examples: driving under the influence of alcohol, 127 S. Ct. at 1601-02 (Scalia, J., dissenting) (citing *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004) (driving under the influence of alcohol does not pose a "substantial risk that physical force against the person or property of another may be used" under 18 U.S.C. § 16(b)), and operating a dump truck without the consent of the owner, *id.* at 1606 n.4 (Scalia, J., dissenting) (citing *United States* v. *Johnson*, 417 F.3d 990 (8th Cir. 2005)). The list could readily be multiplied: felon in possession of a firearm, *United States* v. *Doe*, 960 F.2d 221, 222 (1st Cir. 1992) (Breyer, C.J.) (holding that possession of firearms is not violent but noting split of authority), unlawful transportation of hazardous chemicals, which then-Chief Judge Breyer hypothesized in *Doe*, *id.* at 225, attempting to elude a police vehicle, *United States* v. *Kelly*, 422 F.3d 889, 893 (9th Cir. 2005) (holding this offense was not a crime of violence), and resisting arrest, *United States* v. *Wardrick*, 350 F.3d 446, 455 (4th Cir. 2003) (holding that resisting arrest is a crime of violence). The controlling opinion in *James* says nothing at all about how

lower courts are supposed to determine whether any crime which is not analogous to one of the enumerated crimes in the ACCA is a violent felony.

This case presents an ideal vehicle for resolving this unanswered question, and providing lower courts a generally applicable standard for determining whether crimes that are not analogous to the enumerated crimes in the ACCA fall within the ACCA's residual provision for violent felonies. *Both* the majority and the dissent in *James* acknowledged that the crime of escape is not analogous to any of the enumerated offenses. *James*, 127 S. Ct. at 1598; *id.* at 1606 n.4 (Scalia, J., dissenting). And *both* the majority and the dissent in *James* recognize that providing a generally applicable standard for such crimes is a "worthy objective." *Id.* at 1598; *id.* at 1602 (Scalia, J., dissenting) ("Imprecision and indeterminacy are particularly inappropriate in the application of a criminal statute. Years of prison hinge on the scope of the ACCA's residual provision, yet its boundaries are ill defined."). Indeed, the urgency of providing some generally applicable guidance is heightened by the concern that the statute is otherwise impermissibly vague. *Id.* at 1609 (Scalia, J., dissenting) (citing *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983)).

3. Accepting review of this case will also provide this Court with an opportunity to place a principled limit on the scope of the residual clause. The *Gosling* rationale for treating failure-to-report escapes as violent crimes is essentially without limit, as the D.C. Circuit in *Thomas* correctly recognized. If the fear of recapture is sufficient to give rise to a "serious potential risk of injury to another," 18 U.S.C. § 924(e)(2)(B)(ii), then it is hard to see what crime is not a violent felony under the ACCA. All crimes carry a risk of detection and, even if no detection occurs in the commission of the crime, there always remains the risk of subsequent capture. *Thomas*, 333 F.3d at 282. There is no reason to believe that individuals who fail to report for custody are

especially likely to engage in violence if confronted by an officer seeking to capture them. *Golden*, 466 F.3d at 615 (Rovner, J., concurring) (arguing that, unlike escape from custody, the "mere failure to report to custody in the first instance does not reflect" a specific inclination to resist or evade restraint).

Needless to say, any reading of the residual provision that expands it to encompass all or nearly all crimes is problematic. The text of the statute cannot be squared with the view that Congress intended to impose its substantial penalty (a 15-year mandatory minimum) for just any armed repeat offender. The statute singles out certain of the most dangerous and socially destructive armed repeat offenders: those with a history of violent felonious conduct and repeat drug offenders. 18 U.S.C. § 924(e); H.R. Rep. No. 98-1073, at 1-3 (1984) (discussing purpose of the enhanced penalty, which was to incapacitate the kinds of repeat violent offenders that studies had shown were responsible for a high volume of violent crime). "If Congress wanted ... [to] subject[] *all* repeat offenders to a 15-year mandatory prison term[,] it could very easily have crafted a statute which said that. ACCA ... was obviously not meant to have such an effect." *James*, 127 S. Ct. at 1609 (Scalia, J., dissenting); *Doe*, 960 F.2d at 225 (refusing to treat a conviction for being a felon in possession of a firearm as a violent crime because to do so would "bring within the statute's scope a host of other crimes that do not seem to belong there").

Further, the broad reading of the residual provision that is necessary to conclude that failure-to-report escapes are violent crimes is inconsistent with the language of the ACCA. As then-Chief Judge Breyer observed, "The statute gives several specific examples—burglary, arson, extortion, use of explosives—and then adds, 'or otherwise involves *conduct* that presents a serious potential risk of physical injury to another.'" *Id.* at 224. When the act of committing the crime at issue does not involve the serious potential for "active

violence," *id.* at 225, then the text of the statute points away from its inclusion as a "violent felony." See *Leocal* v. *Ashcroft*, 543 U.S. 1, 10-11 (2004) (defining "crime of violence" under 18 U.S.C. § 16(b) to mean "violent, active crimes").

This Court in *James* suggested that some limits to the residual clause are still waiting to be articulated. The Court concluded that Florida's version of attempted burglary, which required proof of an overt act to enter a structure, *James*, 127 S. Ct. at 1594, carried a sufficient potential risk of violence to satisfy the residual clause. But, this Court noted, other jurisdictions allowed convictions for attempted burglary based on conduct that poses a lesser risk of confrontation with others. *Id.* at 1596 n.4 (collecting cases where burglary was defined to include merely "making a duplicate key" or "casing [a] building" or neighborhood). While this Court withheld any judgment as to those statutes, it noted that the risk of violence presented by such crimes was "more attenuated." *Id.* at 1596.

This case presents a crime with a substantially "attenuated" risk of violent confrontation. A failure-to-report escape does not involve any active violence. Quite the contrary, a failure-to-report escape involves no *action* at all; it is a crime of *inaction*. There is no risk of violence in the commission of such a crime precisely because there is no risk of confrontation in the commission of the crime. The individual who fails to report is choosing *not* to come into contact with others, or expose himself to coming into contact with law enforcement officials. The only risk of violence that has even been considered by the lower courts is not in the commission of a failure-to-report escape (as opposed to an escape from the physical custody of an officer or a secure facility), but rather in the potential for subsequent apprehension. This Court should specifically rule that the risk of violence in subsequent apprehension may not, standing alone, provide the requisite

"serious potential risk" of harm to others for purposes of the residual clause. 18 U.S.C. § 924(e).

Petitioner acknowledges, as the Seventh Circuit emphasized below, that there is a dearth of statistical evidence concerning how frequently failure-to-report or walkaway escapes result in violence. Pet. App. 5a-6a. But this should not deter this Court from engaging this question now. Courts are today being forced to apply this statute to crimes that are not analogous to the enumerated violent felonies in the ACCA. Decisions are, therefore, being made routinely on less than perfect information. See *James*, 127 S. Ct. at 1608 (Scalia, J., dissenting) (noting that deciding whether to treat a crime as falling within the residual provision without hard statistics "is an imponderable that cannot be avoided"). And there is no way of knowing when the hoped-for data will emerge, not only for failure-to-report escapes, but also for the myriad other crimes that arguably fall within the residual provision but are not analogous to any enumerated crime.

Also, it remains for this Court to decide which way the lack of data cuts. It makes little sense to place upon the defendant the burden of presenting data that a crime only infrequently, if at all, involves harm to others, when it is the prosecution that is seeking to enhance the defendant's sentence based on its argument that the crime is a "violent felony" within the meaning of the ACCA. Indeed, as Justice Thomas has observed, and again pointed out in his dissent in *James*, 127 S. Ct. at 1610 (Thomas, J., dissenting), allowing a judge to resolve the contested question whether a particular prior conviction was, in fact, for a "violent felony" raises serious constitutional concerns under the Sixth Amendment. *Shepard*, 544 U.S. at 27 (Thomas, J., concurring). Those concerns are heightened when a court is asked to review potentially contested data and make a finding of fact regarding the allegedly "violent" nature of a particular crime. If such statistical evidence is necessary at all, the prosecution should be required to produce it because the government

carries the burden of establishing that the defendant has three prior convictions qualifying under the ACCA.

* * * *

In the end, this case presents this Court with an excellent vehicle to resolve a split of authority concerning a frequently recurring issue in federal criminal law. More broadly, this case provides this Court with an opportunity to provide generally applicable standards for how lower courts should determine whether a crime that is not analogous to enumerated crimes in the ACCA falls within the residual clause. This Court has already indicated in *James* that articulating such a standard is desirable. This is especially so in light of the fact that, absent this Court's guidance, the lower courts are articulating expansive rationales that cause the residual clause to encompass crimes far beyond the ACCA's text and purpose. This Court's review is urgently needed.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,

Robert N Hochman /pc

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May 8, 2007

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CERTIFICATE OF SERVICE

No. 06-

Deondery Chambers,

Petitioner,

v.

United States of America,

Respondent.

I, Jeffrey T. Green, do hereby certify that, on this eighth day of May, 2007, I caused one copy each of the Motion For Leave To File In Forma Pauperis and the Petition For A Writ Of Certiorari in the foregoing case to be served by an overnight delivery service on the following party:

PAUL D. CLEMENT
SOLICITOR GENERAL
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950 Pennsylvania Avenue, N.W.
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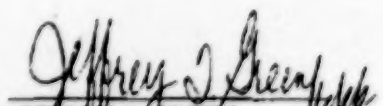

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APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 06-2405

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DEONDERY CHAMBERS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 4:05-cr-40044-JLF—G. Patrick Murphy, *Chief Judge.*

ARGUED DECEMBER 13, 2006—DECIDED JANUARY 9, 2007

Before POSNER, MANION, and EVANS, *Circuit Judges.*

POSNER, *Circuit Judge.* The defendant pleaded guilty to being a felon in possession of a firearm. The judge, finding that the defendant had committed three crimes of violence previously, sentenced him to 188 months as an armed career criminal. 18 U.S.C. § 924(e). The only question presented by the appeal is whether one of those convictions, a conviction under Illinois law for escape, was indeed a crime of violence. The answer depends on whether escape "involves conduct that presents a serious potential risk of physical injury to another." § 924(e)(1). A jail break does; but Illinois defines felonious

escape not only as "intentionally escap[ing] from a penal institution or from the custody of an employee of that institution" but also as "knowingly fail[ing] to report to a penal institution or to report for periodic imprisonment at any time." 720 ILCS 5/31-6(a). The defendant's escape was in the latter category—failing to report to a penal institution. The charging document is not in the record, but as summarized in the presentence investigation report and not challenged by the defendant it states that on four occasions he failed to report on schedule to a penal institution after being convicted for drug possession, robbery, and aggravated battery.

As an original matter, one might have doubted whether failing to report to prison, as distinct from escaping from a jail, prison, or other form of custody, was a crime that typically or often "involves conduct that presents a serious potential risk of physical injury to another." *United States v. Golden*, 466 F.3d 612, 616-17 (7th Cir. 2006) (Williams, J., dissenting). You could show up an hour late (without an excuse) and be guilty of a felony that could result in your receiving a 15-year mandatory minimum sentence under the Armed Career Criminal Act. Had the defendant been sentenced without the enhancement, his guidelines sentencing range would have been 130 to 162 months. See U.S.S.G. §§ 2K2.1(a)(2), (b)(5), 3C1.2, E1.1(a), (b).

But the majority opinion in *Golden*, tracking our earlier opinion in *United States v. Bryant*, 310 F.3d 550 (7th Cir. 2002), refused to carve the Illinois escape statute at the joint, as it were, but held instead that *any* violation of the statute is a crime of violence for purposes of the Act. The other courts of appeals, except the D.C. and Ninth Circuits, are in accord. *United States v. Winn*, 364 F.3d 7 (1st Cir. 2004); *United States v. Luster*, 305 F.3d 199, 202 (3d Cir.

2002); *United States v. Jackson*, 301 F.3d 59, 63 (2d Cir. 2002); *United States v. Turner*, 285 F.3d 909, 915-16 (10th Cir. 2002); *United States v. Gay*, 251 F.3d 950 (11th Cir. 2001) (per curiam); *United States v. Nation*, 243 F.3d 467, 472 (8th Cir. 2001); *United States v. Ruiz*, 180 F.3d 675 (5th Cir. 1999); *United States v. Harris*, 165 F.3d 1062, 1068 (6th Cir. 1999); *United States v. Mitchell*, 113 F.3d 1258, 1533 (10th Cir. 1997). The D.C. Circuit reserved the issue in *United States v. Thomas*, 333 F.3d 280, 282-83 (D.C. Cir. 2003). See also *United States v. Adkins*, 196 F.3d 1112, 1119 (10th Cir. 1999) (McKay, J., concurring), and Judge Rovner's concurring opinion in our *Golden* case. The Ninth Circuit ruled that a peaceful failure to return, followed by the defendant's turning himself in rather than being recaptured, is not a crime of violence. *United States v. Piccolo*, 441 F.3d 1084 (9th Cir. 2006).

All these cases involved either a failure to return to a halfway house—a type of failing to return that seems even less violence-prone than failing to show up at prison, because a violent prisoner would be less likely to be serving a part of his sentence in a halfway house—or a "walkaway" escape, which does not involve breaking out of a building or wrestling free of guards. There would be no impropriety in dividing escapes, for purposes of "crime of violence" classification, into jail or prison breaks on the one hand and walkaways, failures to report, and failures to return, on the other. The sentencing judge would not have to dig beneath the charging document or the other, limited evidence on which a judge is permitted by *Shepard v. United States*, 544 U.S. 13 (2005), to decide which bin a conviction for escape belonged in.

But we shrink from trying to overrule a decision that is only a few months old (*Golden* was decided on October 25,

2006), that tracked an earlier and materially identical decision of this court (*Bryant*), and that has overwhelming support in the decisions of the other circuits. The defendant has not presented us with arguments or evidence that were overlooked or unavailable in the previous cases. He cites us to *United States v. Hagenow*, 423 F.3d 638, 644-45 (7th Cir. 2005), which held that because the offense of "confinement" in Indiana can be committed without endangering the person confined, the sentencing judge has to look behind the label of the defendant's conviction to see whether his conduct endangered anyone. But the defendant in this case is not asking for a deeper investigation into the circumstances of his failure to report. He is asking us to carve out noncustodial from custodial escape, and that is the move rejected in *Bryant* and *Golden*, as well as in the cases we cited from other circuits.

We shall adhere to the precedents for now. But it is an embarrassment to the law when judges base decisions of consequence on conjectures, in this case a conjecture as to the possible danger of physical injury posed by criminals who fail to show up to begin serving their sentences or fail to return from furloughs or to halfway houses. The head of the line of cases that lump all escapes together, *United States v. Goslin*, 39 F.3d 1140, 1142 (10th Cir. 1994), states in colorful language quoted in many of the subsequent cases that "every escape scenario is a powder keg, which may or may not explode into violence and result in physical injury to someone at any given time, but which always has the serious *potential* to do so . . . . A defendant who escapes from a jail is likely to possess a variety of supercharged emotions, and in evading those trying to recapture him, may feel threatened by police officers, ordinary citizens, or even fellow escapees . . . .

[E]ven in a case where a defendant escapes from a jail by stealth and injures no one in the process, there is still a serious risk that injury will result when officers find the defendant and attempt to place him in custody." (Emphasis in original.) This is conjecture floating well free of any facts—even the facts of *Goslin*. The opinion says nothing about the nature of Goslin's escape, but the reference to escaping from a jail suggests that the court wasn't thinking about walkaway escapes, or failures to return or report, but about jail breaks (most jail breaks are stealthy). Its ruminations should not be treated as authoritative in a case that does not involve a jail break.

The Sentencing Commission, or if it is unwilling a criminal justice institute or scholar, would do a great service to federal penology by conducting a study comparing the frequency of violence in escapes from custody to the frequency of violence in failures to report or return. Should it turn out that the latter frequency is very low, this would provide a powerful reason to reexamine *Bryant* and *Golden*. Alternatively, Congress, which has investigative tools, might examine the issue with a view toward a possible clarification of 18 U.S.C. § 924(e)(1).

The most helpful analysis of escapes from United States prisons that we have found, Richard F. Culp, "Frequency and Characteristics of Prison Escapes in the United States: An Analysis of National Data," 85 *Prison J.* 270 (2005), unfortunately excludes from its study "walkaways from minimum-security facilities, failures to return from approved absences, and escapes from custody staff while being transported outside," *id.* at 275, although almost 90 percent of all escapes are walkaways. *Id.* at 278; Camille Graham Camp & George M. Camp, "The Corrections Yearbook 1997" 18 (Criminal Justice Institute, Inc., 1997).

And while the Culp study includes recaptures after an escape, it does not reveal whether a recapture involved violence. *Id.* at 281-82. More than 6 percent of the escapees committed crimes while on the lam, and many of these were violent crimes, *id.* at 285-86, but that is not evidence that escape itself is likely to be violent; for all that appears, the escapees were merely resuming their previous criminal careers. Six percent of the escapes in the study involved violence against prison staff, *id.* at 285—violence on the way out, as it were—but there is no indication of how many of the recaptures (some 75 percent of escaped prisoners are recaptured, *id.* at 282) involved violence. The study notes that records of prison escapes are not standardized and that recapture data are even less reliable than escape data. *Id.* at 271, 277, 281.

It is apparent that more research will be needed to establish whether failures to report or return have properly been categorized by this and most other courts as crimes of violence. Notice too that if courts insist on lumping all escapes together in determining whether escape is a crime of violence, the enormous preponderance of walkaways could well compel a conclusion that escape is never a crime of violence. Some disaggregation seems indicated, but to do it sensibly we judges need data.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 1

FILED
MAY 16 2006
G. PATRICK MURPHY
DISTRICT JUDGE
SOUTHERN DISTRICT OF ILLINOIS
EAST ST. LOUIS, ILLINOIS

UNITED STATES DISTRICT COURT
Southern District of Illinois

UNITED STATES OF AMERICA
V.

DEONDERY LAZAR CHAMBERS, II
a/k/a Deondery L. Chambers

JUDGMENT IN A CRIMINAL CASE

Case Number: 05-40044-001-JLF

USM Number: 06730-025

Phillip J. Kavanaugh, Federal Public Defender
Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 of the Indictment

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 922(g)(1), 924(a)(2), 924(c)	Felon in Possession of a Firearm	May 31, 2005	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

May 12, 2006
Date of Imposition of Judgment

G. Patrick
Signature of Judge

G. Patrick Murphy, Chief Judge
Name and Title of Judge

05/16/06
Date

AO 245B (Rev. 06/05) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: DEONDERY LAZAR CHAMBERS II
CASE NUMBER: 05-40044-001-JLF

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

188 months

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered _____ to _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 3 -- Supervised Release

DEFENDANT: DEONDERY LAZAR CHAMBERS, II
CASE NUMBER: 05-40044-001-JLF

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

5 years

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court, not to exceed 52 tests in a one year period.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: DEONDERY LAZAR CHAMBERS, II
CASE NUMBER: 05-40044-001-JLF

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall pay any financial penalty that is imposed by this judgment, and that remains unpaid at the commencement of the term of supervised release. The defendant shall pay the fine in installments of $20.00 per month or 10% of his net monthly income, whichever is greater.

The defendant shall provide the probation officer and the Financial Litigation Unit of the United States Attorneys' Office with access to any requested financial information. The defendant is advised that the probation office may share financial information with the Financial Litigation Unit.

The defendant shall apply all monies received from income tax refunds, lottery winnings, judgments, and/or any other anticipated or unexpected financial gains to the outstanding court-ordered financial obligation. The defendant shall immediately notify the probation officer of the receipt of any indicated monies.

The defendant shall participate as directed and approved by the probation officer in treatment for narcotic addiction, drug dependence, which includes urinalysis or other drug detection measures and which may require residence and/or participation in a residential treatment facility. Any participation will require complete abstinence from all alcoholic beverages. The defendant shall pay for the costs associated with substance abuse counseling and/or testing based on a co-pay sliding fee scale approved by the United States Probation Office. Co-pay shall never exceed the total costs of counseling.

The defendant shall submit his person, residence, real property, place of business, computer, or vehicle to a search, conducted by the United States Probation Officers at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of supervision. Failure to submit to a search may be grounds for revocation. The defendant shall inform any other residents that the premises may be subject to a search pursuant to this condition.

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

Judgment — Page 5 of 6

DEFENDANT: DEONDERY LAZAR CHAMBERS, II
CASE NUMBER: 05-40044-001-JLF

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$ 750.00	$ N/A

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS	$ 0	$ 0

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☒ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☒ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 6 - Schedule of Payments

Judgment — Page 6 of 6

DEFENDANT: DEONDERY LAZAR CHAMBERS, II
CASE NUMBER: 05-40044-001-JLF

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

F. ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

Payments are due immediately, through the Clerk of the Court, but may be paid from prison earnings in compliance with the Inmate Financial Responsibility Program. Any financial penalties that remain unpaid at the commencement of the term of supervised release shall be paid at the rate of $20.00 per month, or 10% of defendant's monthly net earnings, whichever is greater.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

February 16, 2007

Before

Hon. Richard A. Posner, *Circuit Judge*

Hon. Daniel A. Manion, *Circuit Judge*

Hon. Terence T. Evans, *Circuit Judge*

No. 06-2405

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DEONDERY CHAMBERS,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois.

No. 4:05-cr-40044-JLF

G. Patrick Murphy, *Chief Judge.*

ORDER

On January 22, 2007, defendant-appellant filed a petition for rehearing with suggestion for rehearing *en banc*, and on February 12, 2007, plaintiff-appellee filed an answer to the petition. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*. The petition is therefore DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	CRIMINAL NO. 05-40044-JLF
	)	
vs.	)	
	)	Title 18, United States Code,
DEONDERY LAZAR CHAMBERS, II,	)	Sections 922 and 924
a/k/a Deondery L. Chambers,	)	
	)	
Defendant.	)	

FILED
JUL 06 2005
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
BENTON OFFICE

INDICTMENT

THE GRAND JURY CHARGES:

On or about May 31, 2005, in Jefferson County, within the Southern District of Illinois,

DEONDERY LAZAR CHAMBERS, II,
a/k/a Deondery L. Chambers,

defendant herein, who had previously been convicted of a crime punishable by imprisonment for a term exceeding one year, a felony under the laws of the State of Illinois, on or about July 15, 1998, to wit: Robbery and Aggravated Battery, in the Circuit Court for the Second Judicial Circuit, Jefferson County, Illinois, Case No. 98-CF-109, did knowingly possess in and affecting interstate commerce a firearm, that is: a Smith and Wesson, Model 66, .357 Magnum caliber revolver, serial number 9K6476, all in violation of Title 18, United States Code, Sections 922(g)(1), 924(a)(2), and 924(e).

A TRUE BILL:

John Daniel
FOREPERSON

Randy G. Massa
/s/ RONALD J. TENPAS
United States Attorney

GEORGE A. NORWOOD
Assistant United States Attorney

Recommended Bond: Detention

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CRIMINAL NO. 05-40044-JLF
	)	
DEONDERY LAZAR CHAMBERS, II, a/k/a Deondery L. Chambers	)	
	)	
	)	
Defendant.	)	

INFORMATION CHARGING PRIOR OFFENSES

Comes now the United States of America, by and through its attorneys, Ronald J. Tenpas, United States Attorney for the Southern District of Illinois, and George A. Norwood, Assistant United States Attorney, pursuant to Section 924(e)(1) of Title 18, United States Code, and informs the Court that the government believes that the defendant qualifies as an armed career criminal within the meaning of Section 924(e)(1), stating as follows:

1. That the defendant has been charged in the indictment with a violation of Title 18, United States Code, Section 922(g)(1).

2. That on July 15, 1998, in the Circuit Court, Jefferson County, Illinois, defendant was convicted of Robbery and Aggravated Battery in Case No. 98-CF-109.

3. That on February 24, 1999, in the Circuit Court, Jefferson County, Illinois, defendant was convicted of Escape in Case No. 99-CF-47.

4. That on June 30, 1999, in the Circuit Court, Jefferson County, Illinois, defendant was convicted of Unlawful Delivery of a Controlled Substance within 1000 feet of Public Housing in Case No. 99-CF-157.

WHEREFORE, the United States of America hereby files this Information Charging Prior Offenses to subject the defendant to the enhanced provisions of Title 18, United States Code, Section 924(e)(1) upon his conviction under the Indictment.

s/ George A. Norwood
GEORGE A. NORWOOD
402 West Main Street, Suite 2A
Benton, IL 62812
Phone: (618) 439-3808 Ext. 111
Fax: (618) 439-2401
E-mail: George.Norwood@usdoj.gov

BEST AVAILABLE COPY

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.) No. 05-CR-40044
)
DEONDERY LAZAR CHAMBERS,)
)
Defendant.)

REPORT OF PROCEEDINGS

Sentencing Hearing

BE IT REMEMBERED AND CERTIFIED that heretofore on May 12, 2006, the same being one of the regular judicial days in and for the United States District Court for the Southern District of Illinois, Honorable G. Patrick Murphy presiding, the following proceedings were had in open court in Benton, Illinois, to-wit:

APPEARANCES

Mr. George Norwood
Asst. U.S. Attorney — For the Plaintiff

Mr. Phillip J. Kavanaugh
Federal Public Defender — For the Defendant

JANE McCORKLE
Official Court Reporter
U.S. District Court
301 W. Main Street
Benton, Illinois 62812

THE CLERK: Court calls United States of America versus Deondery Lazar Chambers, case number 05-40044. Are the parties ready?

MR. NORWOOD: The government is present by George Norwood, Assistant U.S. Attorney. We are ready to proceed.

MR. KAVANAUGH: The defendant, Deondery Chambers, is present with his counsel, Phil Kavanaugh. We are ready to proceed.

THE COURT: Let the record show that counsel are present. Mr. Chambers is here with Mr. Kavanaugh, and Mr. Norwood is here, also.

Now the matter is set for sentencing this morning. And in the ordinary course of business, the Probation Department prepared the usual detailed written Presentence Investigation Report. There were objections filed. There was an addendum to the Presentence Investigation Report. I think that's been provided to both sides.

Now, we will get to the objections that are going to require a factual, some factual findings, but as I understand the case, here is where we are. First of all, if the defendant qualifies as a career offender with his Criminal History Category of VI and giving him the three points for cooperation that he would be entitled to, he comes out as a 31. And that seems to the Court, and I stand here to be corrected, but if that's the case, then the other

objections really don't amount to anything because in that event, I think he has a base offense level of 24.

The Probation Department and the government have him for an additional four points on top of that because of the aggravated use of a firearm and then another two points on top of that for reckless endangerment, which would bring him up to a 30. And then he would get his three points off, which would bring him down to a 27.

So it seems to the Court that the most important matter would be to determine, first, whether he is a career offender. Mr. Norwood, have I stated this correctly?

MR. NORWOOD: The government believes so. If he is an armed career criminal, there will be a minimum sentence of 15 years and a maximum sentence of life. If there is not there will be a maximum sentence of 10 years under the felon in possession statute. So I think you're correct with respect that would be dispositive of the legal argument. It would be dispositive of most of the issues. I'm not sure. I believe the defendant will appeal.

THE COURT: Well, I'm still going to make the conditional finding. There's no question about that. I'm not going to leave anything undone.

MR. NORWOOD: Okay.

THE COURT: But that would be the first issue for the Court.

MR. NORWOOD: Then I agree with the Court, Judge.

THE COURT: Mr. Kavanaugh.

MR. KAVANAUGH: There is a slight distinction. In that if the Court finds the defendant used or possessed the firearm in connection with a crime of violence, then the armed career criminal base offense level would be 34 minus three for acceptance. If the Court finds that he didn't possess the firearm in connection with a crime of violence, then it would be 33. It's an eight-month difference, Your Honor. If he's a 34 minus three, it's 188 as the low. If he's a 33 then it would be 180 as the low part, 180 to 210. Other than that the Court's correct in its observations.

THE COURT: All right. We will discuss that as need be, but the first question for the Court is you have the predicate offense for the career offender statute. Now your objection is a simple legal argument that the escape for which he was convicted does not qualify as a violent crime.

MR. KAVANAUGH: That's correct, Your Honor.

THE COURT: And while one might think that to be the case, if my memory doesn't fail me, we have the Bryant case by Judge Kanne who says that it is, and I believe there's at least one other case in the Seventh Circuit. Is that your understanding of the law?

MR. KAVANAUGH: That was the law until we've had Shepard and Hagenow. I believe that those two cases somewhat

alter --

THE COURT: Is that the Ninth Circuit case?

MR. KAVANAUGH: No, Hagenow is a Seventh Circuit case and Shepard, obviously, is a Supreme Court case.

THE COURT: Tell me about the Seventh Circuit case that you think changes it.

MR. KAVANAUGH: Well, Hagenow was decided on August the 31st of 2005. It stands for the proposition that when you have a generic crime like burglary or escape or something like that, the issue of whether or not the conduct, the offense conduct involves a potential risk of physical injury to another or has as an element the use or attempted use of threatened physical force, the sentencing court is to look at the actual charging instrument itself to see what kind of generic conduct was charged in the state court.

In this case Mr. Chambers was convicted of escape, but the actual indictment charges him with failure to report for a periodic imprisonment. In other words, he was sentenced to weekends in jail, and he didn't show up for three of them. On the face of the charging document itself, it's pretty clear that there is no violence, no attempted violence, no suggestion of violence. He just didn't come to report to jail for three weekends.

Ultimately, in that case he was charged with escape. He pled guilty to it. Was continued on probation

and they just gave him four additional weekends to serve subsequent to the plea on the escape charge. There was no indication in that at all that there was any violence involved.

There's another case that we've cited in the sentencing memorandum, and that's another Seventh Circuit case which was decided on December the 19th, 2005, United States versus Sperberg, S-P-E-R-B-E-R-G, and that discusses this issue, also. And it says on page 2 of the printout -- I don't have the exact page number, but it says, "When a law specifies multiple ways to commit an offense, one within the scope of a recidivism enhancement and the other not, the federal court may examine the charging papers and plea colloquy to determine which variety of offense the conviction reflects." to see whether or not in this case this type of escape is violent.

It's pretty clear from the record in state court, Your Honor, that all he did was just didn't show up on time for three weekends.

THE COURT: And you have the indictment there?

MR. KAVANAUGH: Yes, sir.

THE COURT: And what does the indictment provide?

MR. KAVANAUGH: It, basically, charges a violation of -- let's see. First, is a violation of 730 ILCS 5/3-6-4, which basically penalizes a person for failure to return from

furlough or work release.

THE COURT: All right.

MR. KAVANAUGH: Here's a copy of the statute.

THE COURT: You will provide that to my clerk.

MR. KAVANAUGH: I do have the indictment. I left it across the street.

THE COURT: For the moment I will take it as stated. I have no reason not to.

All right, Mr. Norwood. It doesn't sound like we have here what the escape cases talk about. The cases talk about because every escape involved a serious potential risk of physical injury to another, and what I have in mind is I'm trying to give a good example. But someone knocking the guard in the head and crawling over the fence at Marion and making a go for it, and it sounds like here the defendant just simply failed to report, which didn't involve any potential risk of physical injury.

MR. NORWOOD: Well, Your Honor, a couple things. First, the Seventh Circuit has rejected that argument years ago in the Bryant case.

THE COURT: That's Judge Kanne's case.

MR. NORWOOD: Yes, Your Honor. Where that very argument was raised by the defendant objecting to the categorical approach of the Seventh Circuit. And all escapes, no matter if they're walk-away or failure to report

or the old hitting on the guard in-the-head escape, they are all crimes of violence.

I mean that's -- I'll read from -- I know the Court's read the Bryant opinion, but I mean Bryant -- here's what the court said. "Bryant asks this Court to redefine our decision in Franklin by holding that not every crime of escape amounts to a crime of violence. He urges this Court to instead follow a fact-specific approach when determining if a particular crime of escape should be categorized as a crime of violence. Specifically, he argues that the type of escape for which he was charged -- failure to return to a halfway house after being absent on a work release -- is more appropriately thought of as failure to return than an escape. According to his reading the 'failure to return' to a halfway house after being absent without permission prevents so much less of a risk of violence that it must be considered different and distinct from a 'bust-out' or 'slither-away' type of escape."

The Seventh Circuit rejected this very argument.

THE COURT: And you say, too, that the more recent cases cited by the defendant simply do not trump Bryant.

MR. NORWOOD: Absolutely not. I could not find a published Seventh Circuit opinion involving escape, but I have found for the Seventh Circuit in the case, and it cites the case of United States versus Lewis, but the Booker

decision did not change this categorical approach to escape. Booker had to do with --

THE COURT: Booker has nothing to do with this.

MR. NORWOOD: Nothing has changed in the Seventh Circuit. Whether the Ninth Circuit in Piccolo considers it is one thing, but the Seventh Circuit has always considered escapes of any kind, walk-aways, failures to report or an escape or they are busting out of a prison all the same because of the risk of violence. And this Court knows what that risk of violence is, in any escape, is when the officers go to apprehend that person, they don't know why that person failed to report or walked away or escaped. They are risking their lives apprehending somebody who may not want to either report to prison or for whatever reason, and the Seventh Circuit has said it's a powder keg.

THE COURT: In short your response is that irrespective of the arguments, the Seventh Circuit still adheres to Bryant.

MR. NORWOOD: Absolutely.

THE COURT: Period.

MR. NORWOOD: Yes.

THE COURT: Now, we have certain other matters, too, and, of course, I will rule on all of these. The next is the objection to the four points.

Now, the Court understands that the defendant is a

clear. I'm relying on the guideline commentary and not the offense of duress. I realize that's not applicable here.

THE COURT: The Court has heard the evidence, covering all the papers including the briefs, and I note the following: First, the Bryant case by Judge Kanne is still the law in the Seventh Circuit. There Judge Kanne explicitly rejected an argument that is, in all respects, the same as the argument made here, the holding of that case being so explicit this Court would not rule inconsistently with that decision unless it were explicitly clear that it had been overruled and it has not.

The reason stated in that opinion, the Seventh Circuit simply, and for reasons of simplicity, categorically holds that escape is escape. And we're not going to get into the nuances of it for purposes of the sentencing statute. It counts. So we have here what is a career offender under the statute.

Now the other matters are going to be ruled on, too, so the record is clear.

Now, with regard to the four points, the Court will overrule the defendant's objection and will adopt the probation officer's recommended findings of fact there, and for this reason set aside for the moment the fact that the defendant was a felon in possession. And I use those words

ORIGINAL

06-11206

No. 06-

Supreme Court, U.S.
FILED
MAY 08 2007
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Deondery Chambers — PETITIONER
(Your Name)

VS.

United States — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

[X] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):
7th Circuit - pursuant to 18 U.S.C §3006A
U.S. District Court, Southern Illinois - same

[ ] Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

(Signature)

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06-1206

No. 06-

Supreme Court, U.S.
FILED
MAY 08 2007
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IN THE

Supreme Court of the United States

DEONDERY CHAMBERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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Counsel for Petitioner

* Counsel of Record

May 8, 2007

QUESTION PRESENTED

Whether a defendant's failure to report for confinement "involves conduct that presents a serious potential risk of physical injury to another" such that a conviction for escape based on that failure to report is a "violent felony" within the meaning of the Armed Career Criminal Act, 18 U.S.C. § 924(e).

PARTIES TO THE PROCEEDING

The only parties to the proceeding are those appearing in the caption to this petition.

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IN THE

Supreme Court of the United States

No. 06-

DEONDERY CHAMBERS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Deondery Chambers respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was entered on January 9, 2007. It has been officially reported and can be found at *United States* v. *Chambers*, 473 F.3d 724 (7th Cir. 2007). It is reproduced in the Appendix at 1a-7a. The district court held a sentencing hearing on May 12, 2006 at which the judge orally ruled that the defendant's prior conviction for escape under Illinois law was a "violent felony" within the meaning of the Armed Career Criminal Act, 18 U.S.C. § 924(e). The relevant portion of the transcript is reproduced in the Appendix at 18a-27a.

JURISDICTION

The court of appeals issued its opinion on January 9, 2007. Petitioner timely sought rehearing, which was denied on February 16, 2007. Pet. App. 14a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

18 U.S.C. 924(e) provides, in pertinent part, as follows:

> (e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).
>
> (2) As used in this subsection--
>
> * * * *
>
> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

STATEMENT OF THE CASE

This case presents a mature split of authority regarding a recurring issue that members of this Court have recently acknowledged requires this Court's attention. The Armed Career Criminal Act ("ACCA") provides an enhanced 15 year mandatory minimum sentence, and up to life imprisonment, for anyone guilty of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), who had previously been convicted of three serious drug and/or violent felonies. 18 U.S.C. § 924(e). Without the ACCA enhancement, the statutory maximum sentence for a violation of § 922(g)(1) is ten years.

The Courts of Appeals have diverged over whether a prior conviction for escape based on a failure to report to confinement is a "violent felony" within the meaning of the ACCA. Unlike a prison break from secure custody, a failure-to-report escape does not involve breaking free from the physical custody of an officer of the state or a secure detention facility. Failure-to-report escapes occur when a detainee is, for any of a number of reasons, provided the opportunity to move about the community without supervision for a limited period of time, but fails to return or report to his or her facility within the appointed time. It is a crime of omission.

There is a 10 to 2 split of authority on whether all escapes should be treated as violent crimes for purposes of career offender status. The Ninth Circuit has held that a failure-to-report escape is not a violent crime. *United States* v. *Piccolo*, 441 F.3d 1084, 1088-90 (9th Cir. 2006). The D.C. Circuit has also indicated that it would not treat a failure-to-report escape as a violent crime, and recognized that failure-to-report escapes are different from both prison breaks from secures facilities and escapes from the physical custody of an officer. *United States* v. *Thomas*, 333 F.3d 280, 282-83 (D.C. Cir.

2003).[1] In the decision below, Judge Posner acknowledged "[a]s an original matter, one might have doubted whether failing to report to prison, as distinct from escaping from a jail, prison, or other form of custody, was a crime that typically or often 'involves conduct that presents a serious potential risk of physical injury to another.'" Pet. App. 2a (quoting *United States* v. *Golden*, 466 F.3d 612, 616-17 (7th Cir. 2006) (Williams, J., dissenting)). But the Seventh Circuit panel below was bound by prior Seventh Circuit decisions which had held that all escapes are violent crimes. *Id.* Nine other circuits have so held. *United States* v. *Winn*, 364 F.3d 7, 12 (1st Cir. 2004); *United States* v. *Rivera*, 127 F. App'x 543, 545 (2d Cir. 2005) (citing *United States* v. *Jackson*, 301 F.3d 59 (2d Cir. 2002)); *United States* v. *Luster*, 305 F.3d 199, 202 (3d Cir. 2002); *United States* v. *Mathias*, No. 06-4109, 2007 WL 1097952, at *3-5 (4th Cir. Apr. 13, 2007); *United States* v. *Ruiz*, 180 F.3d 675, 676-77 (5th Cir. 1999); *United States* v. *Anglin*, 169 F. App'x 971, 975 (6th Cir. 2006) (citing *United States* v. *Harris*, 165 F.3d 1062 (6th Cir. 1999)), *cert. denied*, 127 S. Ct. 1249 (2007); *United States* v. *Nation*, 243 F.3d 467, 472 (8th Cir. 2001); *United States* v. *Turner*, 285 F.3d 909, 915-16 (10th Cir. 2002); *United States* v. *Gay*, 251 F.3d 950, 952-55 (11th Cir. 2001) (per curiam).

This well developed split of authority warrants this Court's review, especially in light of this Court's recent decision in *James* v. *United States*, 127 S. Ct. 1586 (2007). The relevant provision of the ACCA defines "violent felony" by reference to a list of specific, enumerated offenses (burglary, arson, extortion or crimes involving the use of explosives). 18 U.S.C. § 924(e)(2)(B)(ii). The ACCA also includes a residual provision, covering any unenumerated felony that "otherwise involves conduct that presents a serious potential risk of

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[1] *Thomas* involved an escape from the physical custody of an officer, not a failure to report. 333 F.3d at 282-83. As a result, the D.C. Circuit did not have an occasion in *Thomas* to apply its view that failure-to-report escapes "may not inherently create a risk of harm to others." *Id.* at 283.

physical injury to another." *Id.* Because *James* involved a crime analogous to an enumerated offense (attempted burglary), the majority opinion declined to provide a standard for determining whether an offense that is not analogous to an enumerated offense is a "violent felony" within the meaning of the ACCA. *James*, 127 S. Ct. at 1598. The dissenting opinion argued that leaving such a substantial gap in the interpretation of a frequently invoked federal criminal statute ill serves courts and counsel. *Id.* at 1601-02 (Scalia, J., dissenting). The majority did not disagree that this Court's guidance is needed. It merely noted that a case involving a crime analogous to an enumerated offense was not an appropriate vehicle for an opinion that provides a standard for determining when a crime that is not analogous to an enumerated offense is a "violent felony."

This case is an excellent vehicle to address this substantial gap in the interpretation and application of the ACCA. Failure-to-report escapes occur frequently, and as the body of appellate decisions ruling on whether such escapes are violent crimes indicates, they are often relied upon to support an enhanced sentence for armed career offenders. Failure-to-report escapes are not analogous to any of the crimes specifically enumerated as violent felonies in the ACCA. There is no ambiguity in the record that petitioner's prior conviction for "escape" under Illinois law was for a failure to report to confinement, not a physical break from a secure facility or the custody of a state official.

In short, this case provides a strong vehicle for this Court to address a question of statutory interpretation that its own recent decision indicates is urgently needed. There is a well developed split of authority on the question that, as Judge Posner's opinion indicates, will persist by force of circuit precedent in the absence of action by this Court. The petition should be granted.

1. Petitioner pled guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). Pet. App. 1a. The

indictment also charged that petitioner had violated 18 U.S.C. § 924(e), the ACCA provision that provides for a mandatory minimum sentence of 15 years in prison for those violating § 922(g) who have previously committed three serious drug and/or violent felonies. *Id.* at 15a. The prosecution subsequently filed an information identifying the three predicate convictions it claimed were qualifying felonies under the ACCA that supported sentencing under 18 U.S.C. § 922(e). One of the convictions was for escape under Illinois law on June 30, 1999. *Id.* at 16a.

Illinois law defines an escape to include both breaking free from physical confinement (one who "escapes from any penal institution or from the custody of an employee of that institution") and also failure-to-report escapes (one who "knowingly fails to report to a penal institution or to report for periodic imprisonment at any time or knowingly fails to return from furlough or from work and day release or who knowingly fails to abide by the terms of home confinement"). 720 ILCS 5/31-6(a). There is no dispute that Chambers's "escape" was a failure-to-report, the Illinois charging document made clear that petitioner had been charged with knowingly failing to report for incarceration on various dates. Pet. App. 22a.

The trial court held a sentencing hearing at which petitioner challenged the categorization of his failure-to-report escape conviction as a "violent felony" within the meaning of the ACCA. The district court, citing Seventh Circuit precedent, stated that "for reasons of simplicity ... escape is escape. And we're not going to get into the nuances of it for purposes of the sentencing statute." Pet. App. 27a. Following Seventh Circuit authority, the district court refused to treat a failure-to-report escape as different from a custodial escape, and thus concluded that petitioner was an armed "career offender under the statute." *Id.*

The conclusion that petitioner was an armed career offender under § 924(e) substantially enhanced his sentence, raising

his statutory minimum from 0 to 15 years, and his maximum from 10 years to life. Treating him as an armed career criminal, the district court also applied Section 4A1.4 of the Sentencing Guidelines, which incorporates the ACCA, resulting in a Guidelines range of 188 to 235 months. The district court sentenced petitioner to the low end of that range, 188 months, which is slightly above the statutory mandatory minimum of 15 years under the ACCA. Had he not been treated as an armed career criminal, petitioner's guidelines range would have been 130 to 162 months. Pet. App. 1a-2a. But he would not have been sentenced to more than 120 months because that would have been the statutory maximum for his offense.

2. Petitioner appealed his sentence, and the Seventh Circuit affirmed. Judge Posner's opinion for the court begins by noting that it "might [be] doubted" that a failure-to-report escape is typically or often a crime that poses a serious risk of physical harm to others. Pet. App. 2a. The opinion also explicitly acknowledges a split of authority regarding the treatment of failure-to-report escapes as a violent crime under the ACCA. *Id.* at 2a-3a. And the opinion further recognizes the propriety and ease of distinguishing a failure-to-report escape from "jail or prison breaks" for the purpose of determining whether the escape at issue is a violent crime under the ACCA. *Id.* at 3a.

Nonetheless, the panel chose to adhere to its own court's precedent and held that petitioner's failure-to-report escape was properly considered a violent felony under the ACCA. Pet. App. 3a-4a. Nonetheless, the opinion notes that the rule treating failure-to-report escapes like prison breaks "is an embarrassment to the law" because it is based on "a conjecture as to the possible danger of physical injury posed by criminals who fail to show up to begin serving their sentences or fail to return from furloughs or to halfway houses." *Id* at 4a. The decision further criticizes the reasoning of the "head of the line of cases that lump all escapes together, *United States* v. *Gosling*, 39 F.3d 1140,

1142 (10th Cir. 1994)" that every escape carries the potential for violence because of the "supercharged emotions" that may cause an escapee to "feel threatened by police officers, ordinary citizens, or even fellow escapees." Pet. App. 4a. According to the court, this rationale amounted to "ruminations [that] should not be treated as authoritative" for failure-to-report escapes. *Id.* at 5a. The Seventh Circuit casts further doubt on the majority view by noting that "if the courts insist on lumping all escapes together in determining whether escape is a crime of violence, the enormous preponderance of [failure-to-reports (according to a recent study, nearly 90%)] could well compel a conclusion that escape is never a crime of violence." *Id.* at 6a.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's opinion acknowledges two critical facts about the treatment of failure-to-report escapes: (1) there is a well developed split of authority regarding whether a failure-to-report escape should be deemed a "violent felony," and (2) the rationale for treating a failure-to-report escape as a "violent felony" is weak. These facts alone would warrant this Court's review. But review in this case has been made even more compelling by this Court's decision in *James*, which exposed the urgent need for this Court to address the proper standard for determining whether a crime, such as a failure-to-report escape, that is not analogous to those violent crimes specifically enumerated in the ACCA should be treated as a "violent felony" for purposes of the ACCA.

1. Ten courts, including the Seventh Circuit below, have stated that all escapes should be treated as a violent crime. Pet. App. 3a-4a (decision below); *Winn*, 364 F.3d at 12 (failure to return to halfway house); *Rivera*, 127 F. App'x at 545 (failure-to-report escape is a violent crime under ACCA) (citing *United States* v. *Jackson*, 301 F.3d 59 (2d Cir. 2002) (prisoner walking off from work program)); *Luster*, 305 F.3d at 202 (treating a conviction as a crime of violence even when

"the statute clearly extends to a 'walk away' from custody not involving any contemporary violence"); *Mathias*, 2007 WL 1097952, at *3-5 (walkaway from a work release program); *Ruiz*, 180 F.3d at 676-77 (walkaway from prison camp without barriers and armed guards); *Anglin*, 169 F. App'x at 975 (reasoning that any conviction under the federal escape statute, 18 U.S.C. § 751, is a crime of violence even though the statute extends to conduct as simple as reporting late to serve a sentence) (citing *United States* v. *Harris*, 165 F.3d 1062 (6th Cir. 1999)); *Nation*, 243 F.3d at 472 (stating that "every escape, even a so-called 'walkaway' escape" is a crime of violence); *Turner*, 285 F.3d at 915-16 (failure to return to halfway house); *Gay*, 251 F.3d at 952-55 (walkaway from non-secure diversion center).[2] As the decision below notes, the rationale for this view that has been repeatedly cited and followed by various circuits was articulated by the Tenth Circuit in *United States* v. *Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994). *Gosling* was actually not a failure-to-report case, but involved "'willfully, unlawfully, and feloniously escap[ing] from ... [a] County Jail.'" *Id.* at 1142 (alterations and omission in original). Nonetheless, the *Gosling* court reasoned broadly:

> every escape scenario is a powder keg, which may or may not explode into violence and result in physical injury to someone at any given time, but which always has the serious *potential* to do so. A defendant who escapes from a jail is likely to possess a variety of

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[2] Several of the cases involve appeals challenging the treatment of an escape as a "crime of violence" under the Sentencing Guidelines, U.S.S.G. § 4B1.2. The definition of "crime of violence" provided in that guideline provision is nearly identical to the definition of "violent felony" in the ACCA. *Compare* U.S.S.G. § 4B1.2, *with* 18 U.S.C. § 924(e)(2)(B). For that reason, lower courts have treated cases interpreting this guideline provision as no different from cases interpreting the ACCA, and vice-versa. *See Winn*, 364 F.3d at 9 n.1 (noting uniform view of courts that interpretation and application of Guidelines provision can be applied to ACCA).

> supercharged emotions, and in evading those trying to recapture him, may feel threatened by police officers, ordinary citizens, or even fellow escapees. Consequently, violence could erupt at any time. Indeed, even in a case where a defendant escapes from a jail by stealth and injures no one in the process, there is still a serious potential risk that injury will result when officers find the defendant and attempt to place him in custody.

Id. (internal citation omitted). The Tenth Circuit's reasoning was a material (and unnecessary) extension of the case upon which it relied, *United States* v. *Aragon*, 983 F.2d 1306 (4th Cir. 1993). In *Aragon*, the Fourth Circuit had held that escape from a federal prison was a crime of violence because of the circumstances of the prison custodial setting. *Id.* at 1313. That limited rationale would have been sufficient to support treating Gosling's escape from jail as a crime of violence. But the Tenth Circuit went further, looking beyond the circumstances of the case to the potential circumstances of the escapee's later apprehension.

Gosling's speculation regarding the potential for violence during recapture has proved the essential justification for treating failure-to-report escapes as violent crimes just like jail or prison breaks. *Winn*, 364 F.3d at 12 (treating failure to return to halfway house as violent crime because "there is still a serious potential risk that injury will result when officers find the defendant and attempt to place him in custody"); *Luster*, 305 F.3d at 202 (emphasizing that "the escapee must continue to evade police and avoid capture"); *Mathias*, 2007 WL 1097952, at *4 ("Even if the escape itself could somehow sidestep any potential risk of injury, the circumstances of recapture necessarily encompass just such a risk."); *Turner*, 285 F.3d at 916 ("there is no way to predict what an escapee will do when encountered by the authorities"). Indeed, the Seventh Circuit decision which bound the panel below specifically relied on the argument that "the potential for a violent confrontation arises between the defendant and law

enforcement during the attempted capture," even when the escape crime was a mere failure to report to a correctional facility or a halfway house. *United States* v. *Golden*, 466 F.3d 612, 614 (7th Cir. 2006), *petition for cert. filed*, No. 06-10751 (U.S. Apr. 9, 2007).

Two courts have openly rejected the rationale behind the majority view. The Ninth Circuit has specifically held that a failure-to-return escape is not a crime of violence. *Piccolo*, 441 F.3d at 1088-90. The Ninth Circuit noted that failure-to-report or walkaway escapes, do not involve the same risk of confrontation as an escape from secure confinement or physical custody. *Id.* at 1088. *Piccolo* squarely rejected *Gosling*, and its progeny, precisely because the danger to others posed by an escape from "a secured facility or the custody of an armed guard" is not present when the escapee leaves a halfway house with permission and fails to return. *Id.* at 1089.

The D.C. Circuit has specifically discussed the recapture rationale, and rejected it. *Thomas*, 333 F.3d at 282-83. After noting that numerous courts have followed the reasoning of *Gosling*, *Thomas* observed:

> While it may be true that the recapture of an escapee inherently contains a risk of violent encounter between the escapee and the arresting officers, the same is true as to the capture of any lawbreaker. Thus, one might argue that under the approach of those circuits, all crimes become crimes of violence ....

Id. at 282. Though the *Thomas* court rejected the rationale of *Gosling*, it nonetheless concluded that the escape before it was a crime of violence because Thomas's crime was "escape from an officer," which creates a more apparent risk of violence. *Id.* at 283. Anticipating the analysis in *Piccolo*, the D.C. Circuit observed: "A prisoner not returning to a halfway house or sneaking away from an unguarded position in the night may not inherently create a risk of harm to others. A

prisoner escaping from the custody of an officer does create such an inherent risk." *Id.*

In the decision below, Judge Posner was bound by circuit precedent, but made clear his belief that there is substantial merit to the analyses of the Ninth and D.C. Circuits. He specifically recognized that this Court's decisions make it perfectly appropriate to distinguishing between an escape from physical custody on the one hand and a failure-to-report or walkaway escape on the other. "The sentencing judge would not have to dig beneath the charging document or the other, limited evidence on which a judge is permitted by *United States* v. *Shepard*, 544 U.S. 13 (2005), to decide which bin a conviction for escape belonged in." Pet. App. 3a.[3] He also pointed to the absurdity of the majority rule: showing up an hour late to prison could result in a 15-year mandatory sentence under the ACCA. *Id.* at 2a.

Judge Posner's reservations about the result in this case were not sufficient, however, to overcome the force of circuit precedent. The same will remain true in the numerous other circuits where the decision has already been made, based on highly questionable reasoning, to treat all escapes as violent crimes. And the issue is likely to continue to arise with some frequency. As the substantial body of decisions in the lower courts demonstrates, a prior conviction for escape is commonly relied upon as a predicate violent crime to support an armed career offender sentence. Numerous statutes, including the Illinois statute at issue here, 720 ILCS 5/31-6(a), and the federal escape statute, have been interpreted or expressly define escape to include not only escape from the physical custody of a state official or secure facility, but also

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[3] This Court held in *Shepard* that a subsequent court trying to determine whether a prior conviction should be treated as a violent felony under the ACCA may consider "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." 544 U.S. at 16; *see also Taylor* v. *United States*, 495 U.S. 575, 600-02 (1990).

failures to report and walkaways from non-secure facilities. See, *e.g.*, *Anglin*, 169 F. App'x at 974-75 (discussing the breadth of the federal escape statute, 18 U.S.C. § 751); 18 Pa. Cons. Stat. Ann. § 5121(a) (defining escape to include "fail[ure] to return to official detention following temporary leave granted for a specific purpose or limited period"); N.J. Stat. Ann. 2C:29-5(a) (same); Ariz. Stat § 13-2501 (same); Cal. Penal Code § 4530 (subsection (c) defines escape to include the "willful failure ... to return" of those on temporary release); Ga. Code Ann. § 16-10-52 (subsection (a)(5) includes failure to return). Only this Court's intervention can resolve the split of authority and provide uniform treatment of this frequently invoked provision that produces such harsh sentences.

2. The need for this Court's review of this issue has been made even more urgent by this Court's recent decision in *James* v. *United States*, 127 S. Ct. 1586 (2007). In *James*, this Court held that attempted burglary, as defined by Florida law, is a violent felony for purposes of the ACCA's residual clause. *Id.* at 1590-91. The reasoning of the decision was, however, limited. This Court did not offer a generally applicable method for determining whether unenumerated crimes qualify as violent felonies under the ACCA's residual clause. The majority opinion did not purport to decide whether attempted burglary, if it were defined differently than it has been defined in Florida, would qualify as a violent felony under the residual clause. *Id.* at 1595-96. Instead, it simply determined that attempted burglary as defined by Florida law "poses the same kind of risk" as completed burglary (which is an enumerated violent felony under the ACCA), and hence is properly considered a violent felony under the residual clause. *Id.* at 1595.

The *James* majority concedes that it did not provide any guidance for lower courts with respect to whether a crime that is not analogous to one of the enumerated crimes in the ACCA is a violent felony. The majority acknowledged that

"provid[ing] guidance for the lower courts in future cases [is] surely a worthy objective." *Id.* at 1598. But *James* itself was not a proper case to do so because the case did not present such a crime, and certain issues relevant to the inquiry had not been briefed. *Id.*

Justice Scalia's dissenting opinion elaborated on why it is so important to provide a generally applicable, uniform standard that lower courts can use to decide whether an offense is a "violent felony" within the meaning of the ACCA: without such guidance, the court system is left without any way to provide "an acceptable degree of consistency by the hundreds of district judges that impose sentences every day." *Id.* at 1601 (Scalia, J., dissenting). The *James* dissent noted that there are numerous crimes that are not analogous to any of the enumerated offenses (burglary, arson, extortion, and crimes involving the use of explosives, 18 U.S.C. § 924(e)(2)(B)(ii)). Justice Scalia himself provided various examples: driving under the influence of alcohol, 127 S. Ct. at 1601-02 (Scalia, J., dissenting) (citing *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004) (driving under the influence of alcohol does not pose a "substantial risk that physical force against the person or property of another may be used" under 18 U.S.C. § 16(b)), and operating a dump truck without the consent of the owner, *id.* at 1606 n.4 (Scalia, J., dissenting) (citing *United States* v. *Johnson*, 417 F.3d 990 (8th Cir. 2005)). The list could readily be multiplied: felon in possession of a firearm, *United States* v. *Doe*, 960 F.2d 221, 222 (1st Cir. 1992) (Breyer, C.J.) (holding that possession of firearms is not violent but noting split of authority), unlawful transportation of hazardous chemicals, which then-Chief Judge Breyer hypothesized in *Doe*, *id.* at 225, attempting to elude a police vehicle, *United States* v. *Kelly*, 422 F.3d 889, 893 (9th Cir. 2005) (holding this offense was not a crime of violence), and resisting arrest, *United States* v. *Wardrick*, 350 F.3d 446, 455 (4th Cir. 2003) (holding that resisting arrest is a crime of violence). The controlling opinion in *James* says nothing at all about how

lower courts are supposed to determine whether any crime which is not analogous to one of the enumerated crimes in the ACCA is a violent felony.

This case presents an ideal vehicle for resolving this unanswered question, and providing lower courts a generally applicable standard for determining whether crimes that are not analogous to the enumerated crimes in the ACCA fall within the ACCA's residual provision for violent felonies. *Both* the majority and the dissent in *James* acknowledged that the crime of escape is not analogous to any of the enumerated offenses. *James*, 127 S. Ct. at 1598; *id.* at 1606 n.4 (Scalia, J., dissenting). And *both* the majority and the dissent in *James* recognize that providing a generally applicable standard for such crimes is a "worthy objective." *Id.* at 1598; *id.* at 1602 (Scalia, J., dissenting) ("Imprecision and indeterminacy are particularly inappropriate in the application of a criminal statute. Years of prison hinge on the scope of the ACCA's residual provision, yet its boundaries are ill defined."). Indeed, the urgency of providing some generally applicable guidance is heightened by the concern that the statute is otherwise impermissibly vague. *Id.* at 1609 (Scalia, J., dissenting) (citing *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983)).

3. Accepting review of this case will also provide this Court with an opportunity to place a principled limit on the scope of the residual clause. The *Gosling* rationale for treating failure-to-report escapes as violent crimes is essentially without limit, as the D.C. Circuit in *Thomas* correctly recognized. If the fear of recapture is sufficient to give rise to a "serious potential risk of injury to another," 18 U.S.C. § 924(e)(2)(B)(ii), then it is hard to see what crime is not a violent felony under the ACCA. All crimes carry a risk of detection and, even if no detection occurs in the commission of the crime, there always remains the risk of subsequent capture. *Thomas*, 333 F.3d at 282. There is no reason to believe that individuals who fail to report for custody are

especially likely to engage in violence if confronted by an officer seeking to capture them. *Golden*, 466 F.3d at 615 (Rovner, J., concurring) (arguing that, unlike escape from custody, the "mere failure to report to custody in the first instance does not reflect" a specific inclination to resist or evade restraint).

Needless to say, any reading of the residual provision that expands it to encompass all or nearly all crimes is problematic. The text of the statute cannot be squared with the view that Congress intended to impose its substantial penalty (a 15-year mandatory minimum) for just any armed repeat offender. The statute singles out certain of the most dangerous and socially destructive armed repeat offenders: those with a history of violent felonious conduct and repeat drug offenders. 18 U.S.C. § 924(e); H.R. Rep. No. 98-1073, at 1-3 (1984) (discussing purpose of the enhanced penalty, which was to incapacitate the kinds of repeat violent offenders that studies had shown were responsible for a high volume of violent crime). "If Congress wanted ... [to] subject[] *all* repeat offenders to a 15-year mandatory prison term[,] it could very easily have crafted a statute which said that. ACCA ... was obviously not meant to have such an effect." *James*, 127 S. Ct. at 1609 (Scalia, J., dissenting); *Doe*, 960 F.2d at 225 (refusing to treat a conviction for being a felon in possession of a firearm as a violent crime because to do so would "bring within the statute's scope a host of other crimes that do not seem to belong there").

Further, the broad reading of the residual provision that is necessary to conclude that failure-to-report escapes are violent crimes is inconsistent with the language of the ACCA. As then-Chief Judge Breyer observed, "The statute gives several specific examples-- burglary, arson, extortion, use of explosives -- and then adds, 'or otherwise involves *conduct* that presents a serious potential risk of physical injury to another.'" *Id.* at 224. When the act of committing the crime at issue does not involve the serious potential for "active

violence," *id.* at 225, then the text of the statute points away from its inclusion as a "violent felony." See *Leocal* v. *Ashcroft*, 543 U.S. 1, 10-11 (2004) (defining "crime of violence" under 18 U.S.C. § 16(b) to mean "violent, active crimes").

This Court in *James* suggested that some limits to the residual clause are still waiting to be articulated. The Court concluded that Florida's version of attempted burglary, which required proof of an overt act to enter a structure, *James*, 127 S. Ct. at 1594, carried a sufficient potential risk of violence to satisfy the residual clause. But, this Court noted, other jurisdictions allowed convictions for attempted burglary based on conduct that poses a lesser risk of confrontation with others. *Id.* at 1596 n.4 (collecting cases where burglary was defined to include merely "making a duplicate key" or "casing [a] building" or neighborhood). While this Court withheld any judgment as to those statutes, it noted that the risk of violence presented by such crimes was "more attenuated." *Id.* at 1596.

This case presents a crime with a substantially "attenuated" risk of violent confrontation. A failure-to-report escape does not involve any active violence. Quite the contrary, a failure-to-report escape involves no *action* at all; it is a crime of *inaction*. There is no risk of violence in the commission of such a crime precisely because there is no risk of confrontation in the commission of the crime. The individual who fails to report is choosing *not* to come into contact with others, or expose himself to coming into contact with law enforcement officials. The only risk of violence that has even been considered by the lower courts is not in the commission of a failure-to-report escape (as opposed to an escape from the physical custody of an officer or a secure facility), but rather in the potential for subsequent apprehension. This Court should specifically rule that the risk of violence in subsequent apprehension may not, standing alone, provide the requisite

"serious potential risk" of harm to others for purposes of the residual clause. 18 U.S.C. § 924(e).

Petitioner acknowledges, as the Seventh Circuit emphasized below, that there is a dearth of statistical evidence concerning how frequently failure-to-report or walkaway escapes result in violence. Pet. App. 5a-6a. But this should not deter this Court from engaging this question now. Courts are today being forced to apply this statute to crimes that are not analogous to the enumerated violent felonies in the ACCA. Decisions are, therefore, being made routinely on less than perfect information. See *James*, 127 S. Ct. at 1608 (Scalia, J., dissenting) (noting that deciding whether to treat a crime as falling within the residual provision without hard statistics "is an imponderable that cannot be avoided"). And there is no way of knowing when the hoped-for data will emerge, not only for failure-to-report escapes, but also for the myriad other crimes that arguably fall within the residual provision but are not analogous to any enumerated crime.

Also, it remains for this Court to decide which way the lack of data cuts. It makes little sense to place upon the defendant the burden of presenting data that a crime only infrequently, if at all, involves harm to others, when it is the prosecution that is seeking to enhance the defendant's sentence based on its argument that the crime is a "violent felony" within the meaning of the ACCA. Indeed, as Justice Thomas has observed, and again pointed out in his dissent in *James*, 127 S. Ct. at 1610 (Thomas, J., dissenting), allowing a judge to resolve the contested question whether a particular prior conviction was, in fact, for a "violent felony" raises serious constitutional concerns under the Sixth Amendment. *Shepard*, 544 U.S. at 27 (Thomas, J., concurring). Those concerns are heightened when a court is asked to review potentially contested data and make a finding of fact regarding the allegedly "violent" nature of a particular crime. If such statistical evidence is necessary at all, the prosecution should be required to produce it because the government

carries the burden of establishing that the defendant has three prior convictions qualifying under the ACCA.

* * * *

In the end, this case presents this Court with an excellent vehicle to resolve a split of authority concerning a frequently recurring issue in federal criminal law. More broadly, this case provides this Court with an opportunity to provide generally applicable standards for how lower courts should determine whether a crime that is not analogous to enumerated crimes in the ACCA falls within the residual clause. This Court has already indicated in *James* that articulating such a standard is desirable. This is especially so in light of the fact that, absent this Court's guidance, the lower courts are articulating expansive rationales that cause the residual clause to encompass crimes far beyond the ACCA's text and purpose. This Court's review is urgently needed.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

No. 06-

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Petitioner,

v.

United States of America,

Respondent.

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I, Jeffrey T. Green, do hereby certify that, on this eighth day of May, 2007, I caused one copy each of the Motion For Leave To File In Forma Pauperis and the Petition For A Writ Of Certiorari in the foregoing case to be served by an overnight delivery service on the following party:

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